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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 570

CARL MEYER, *Petitioner,*

vs.

TERRITORY OF HAWAII, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION[1] TO PETITION FOR WRIT OF CERTIORARI, to the United States Circuit Court of Appeals for the Ninth Circuit.

OPINION BELOW.

The majority opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 320-335) is reported in 164 F. 2d. 845. The dissenting opinion in that

[1]It is to be noted that petitioner did not annex a supporting brief to his petition for writ of certiorari nor was such brief separately presented. In this respect petitioner has failed to comply with Rule 38(2) of the Rules of the Supreme Court adopted February 13, 1939, effective February 27, 1939. This alone is sufficient reason for denying the petition. See cases cited under said Rule 38(2), also *Flournoy v. Wiener*, La., 1944, 64 S. Ct. 548, 321 U.S. 253, 88 L. Ed. 708.

Court (R. 335-346) is reported in 164 F. 2d. 851. The opinion of the Supreme Court of the Territory of Hawaii (R. 298-302) is reported in 37 Haw. 102.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 2, 1947 (R. 346). The petition for writ of certiorari was filed on February 4, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. Sec. 347(a)).

QUESTIONS PRESENTED.

The following questions are presented:

1. Did the Circuit Court of Appeals have appellate jurisdiction in this case?

2. Did the dismissal of the writ of error by the Supreme Court of the Territory of Hawaii violate the due process clause of the Fifth Amendment of the Constitution of the United States?

SUMMARY STATEMENT OF THE MATTER INVOLVED.

To the petitioner's summary statement of the matter involved as set forth in his petition on pages 2 to 4, respondent respectfully calls the Court's attention to the fact that the Supreme Court of the Territory of Hawaii dismissed the writ of error not only for the

ground stated by petitioner but also because the matters involved were "not properly briefed in conformity to the requirement of paragraph 1(e), supra" (Rules of the Supreme Court of the Territory of Hawaii, rule 3, par. 1(e), 36 Haw. 753). For a complete statement of the opinion of the Supreme Court of Hawaii, see the pages 298 to 302 of the printed record of this Court.

Another fact which respondent feels should be borne in mind when considering the judgment of the Court below is the fact that the record before the Court below and now before this Court did *not* contain a transcript of the testimony and the exhibits introduced at the trial. This transcript was specifically excluded from the record. (See R. p. 13).

ARGUMENT.

The reasons relied upon by petitioner for allowance of the writ of certiorari (pages 5 to 13 of the petition for writ of certiorari) are an almost verbatim repetition of the dissenting opinion of Circuit Court Judge Denman in the Court below (R. 335-346). The majority opinion of that Court (R. 320-335), which respondent respectfully submits is well considered and well grounded, is a full and conclusive answer thereto.

The ruling of the majority opinion in the Court below is in conformity with its previous ruling in the case of *Young v. Territory of Hawaii,* 160 F. 2d.

289, certiorari denied June 16, 1946, 331 U.S. 849. It is interesting to note that Circuit Court Judge Denman also dissented in the latter case.

No federal question was presented in the appeal to the Court below.

The only basis for the exercise of appellate jurisdiction by the Court below lies in paragraph (a) (Fourth) of Section 128 of the Judicial Code as amended, 28 U.S.C.A. Sec. 225 (a) (Fourth) (See appendix hereto). It is submitted that the Constitution or a statute or treaty of the United States or any authority exercised thereunder is not involved herein.

The only question involved is purely a local matter, namely, the interpretation and construction and application of Rule 3, paragraph 1 (d) and 1 (e) of the Rules of the Supreme Court of the Territory of Hawaii. (See appendix.)

It is not urged by petitioner that the rules of the Hawaii Supreme Court or any portion thereof are unconstitutional.

Before discussing the above-mentioned rule it might be well at the outset to observe that the right to an appeal, even in the continental United States, is not in and of itself a constitutional right. As the Court below stated "appellate review is not essential to due process of law, but is a matter of grace", citing *Luckenbach S.S. Co. v. United States,* 272 U.S. 533, 536. By making this observation we do not wish to have the Court infer that petitioner was denied the

right to appeal. It was accorded to him, but was not exercised or perfected and carried to its conclusion in the manner and form prescribed by the applicable rules which within their limited ambit have the force of law. The right to appeal is purely statutory and the legislature and the courts within their granted powers may affix such conditions thereto as seem fit.

Tinkoff v. United States, CCA-7, 86 F. 2d. 868, 881, certiorari denied 57 S. Ct. 795, 301 U.S. 689, 81 L. Ed. 1346, rehearing denied 57 S. Ct. 937, 301 U.S. 715, 81 L. Ed. 1366;

American Surety Co. v. United States, CCA-5, 239 Fed. 680;

Lovvorn v. Johnston, CCA-9, 118 F. 2d. 704, 706, certiorari denied 62 S. Ct. 92, 314 U.S. 607, 86 L. Ed. 488.

In the instant case the right to appeal from the Circuit Court of the Territory of Hawaii to the Supreme Court of the Territory of Hawaii is fixed by Hawaiian law, not federal law or the organic law. Sections 9551 and 9555 of the Revised Laws of Hawaii 1945. (See appendix.)

It is, therefore, a matter fixed and determined exclusively by local law and involves no statute of the United States.

The rules of the Supreme Court of the Territory of Hawaii are fixed by that Court pursuant to local statutory authority, Section 9613 of the Revised Laws of Hawaii 1945 (See appendix), and are purely local in nature.

It, therefore, follows that an interpretation, construction or application of the rules of the Supreme Court of Hawaii does not involve either the constitution or laws of the United States.

Kimbrel v. Territory of Hawaii, CCA-9, 41 F. 2d. 740;

Ramos v. Leahy, CCA-1, 111 F. 2d. 955;

Martinez v. Sancho, CCA-1, 108 F. 2d. 960, 961;

Bengoechea Macias v. De La Torre & Ramirez, CCA-1, 84 F. 2d. 894;

Succession of Tristani v. Colon, CCA-1, 71 F. 2d. 374, 375;

Barrington v. Missouri, 205 U.S. 483, 27 S. Ct. 582, 51 L. Ed. 890;

City and County of San Francisco v. Jane Scott, 111 U.S. 768, 4 S. Ct. 688, 28 L. Ed. 593;

West v. State of Louisiana, 194 U.S. 258, 24 S. Ct. 650, 48 L. Ed. 965.

From the foregoing it should be clear that the Court below not only properly affirmed the judgment of the Supreme Court of the Territory of Hawaii but could well have dismissed the appeal for lack of jurisdiction under the applicable provisions of 28 U.S. C.A. Section 225 (a).

Petitioner was not denied due process of law.

Assuming arguendo that a federal question is lurking in this record we respectfully submit that such question is not real and substantial. The question here involved is less real and less substantial than

that presented in *Young v. Territory of Hawaii,* supra.

See also: *Fukunaga v. Territory of Hawaii,* CCA-9, 33 F. 2d. 396, 397, certiorari denied 280 U.S. 593-594.

When reviewing the rulings of a territorial court judicial tradition gives substance to the rule of this Court "that deference shall be paid the understanding of territorial courts on matters of local concern." *Waialua Co. v. Christian,* 305 U.S. 91, 107-108. In that case this Court further said:

> "* * * It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; but we are of the opinion that this power should be exercised only in cases of manifest error. * * * In so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. *Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii."* [Emphasis supplied].

See also *Gallardo v. Gonzales,* CCA-1, 143 F. 2d. 947, 949.

The position taken by the Supreme Court of the Territory of Hawaii in dismissing the writ of error was not novel, fanciful or capricious, but in fact was

in conformity with the practice followed by this and other appellate courts throughout the country. The decisions of this Court to that effect are cited under its rule 38 (2). To those may be added the following:

Jessionowski v. Boston Maine Railroad, 67 S. Ct. 401, 404;

Sovereign Camp of the Woodmen of the World v. Jackson, CCA-8, 97 Fed. 382, 385;

Wheeler v. United States, CCA-9, 77 F. 2d. 216, 218;

Muyres v. United States, CCA-9, 89 F. 2d. 783, 784;

Hoffman v. United States, CCA-10, 68 F. 2d. 101, 104.

The above and many other authorities clearly illustrate that it is not unreasonable for an appellate court to dismiss an appeal where the appellant has failed to comply with the rules relative to specifications of error—especially when the Court has given previous warnings that the rule will be enforced.

Such previous warnings have been repeatedly given by the Supreme Court of Hawaii. In *Territory v. Taok,* 33 Haw. 560, 564, the Court said:

> "The appellant absolutely failed to comply with the provisions of rule 3 (b) of this Court that the brief contain 'a specification of the exceptions or assigned errors which are relied upon'. Failure to observe the rule may merit dismissal."

The Court in said case, however, considered the merits of the case obviously for the reason that the

appellant was found guilty and sentenced for the offense of gross cheat upon an information which did not allege an offense under the criminal statutes of the Territory of Hawaii. It is apparent that the Court had no jurisdiction when no offense was committed by the appellant.

In *Furtado v. Rezents,* 33 Haw. 569, the Court stated,

> "No specifications of error are included in appellant's brief as required by the rule of the court. This is a fault of recurring frequency and if persisted in the court for its own protection will be compelled to resort to punitive measures."

The power to dismiss appeals and writs of error for violation of rules of the Court, being discretionary, was not exercised by the Court in the above-mentioned cases, apparently because the violation was not too flagrant.

However, in *Watumull v. Tax Commissioner,* 34 Haw. 84, on a motion to dismiss a writ of error for failure to comply with rule 3 (b) (in force since June 1, 1921, see 25 Haw. 825, 826) which is now rule 3 (d), the Court held,

> "Equally objectionable and deficient is the brief of plaintiffs in error. It contains no specifications of error required by rule 3 (b) of the Supreme Court. This court has repeatedly called the attention of litigants and the bar to the requirements of this rule."

It is further submitted that the Supreme Court of the Territory of Hawaii had dismissed writ of error in other cases for violations of other rules of court, which are apparently more technical than those invoked by the Hawaii Supreme Court in this case.

Writ of error dismissed for failure to file necessary papers within 20 days.

Laahia v. Poomaikai, 20 Haw. 39;
Holiona v. Kamai, 24 Haw. 636.

Appeal dismissed for failure to file necessary papers within twenty days.

Estate of Cecil Brown, 24 Haw. 711;
Estate of Nukushina, 33 Haw. 658.

Petitioner seeks to have this Court, as he sought to have the Court below do, substitute its judgment for that of the Supreme Court of the Territory of Hawaii in the interpretation, construction and application of the rules of the Supreme Court of Hawaii. He suggests that *Frank v. Mangum,* 237 U.S. 309, 35 S. Ct. 582, supports his position. Yet in that case, 237 U.S. at pages 334, 335, the Court referring to due process of law, said:

> "This familiar phrase does not mean that operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the courts or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases."

See also *Rescue Army v. Municipal Court,* 331 U.S. 549, 584.

We can best close by quoting the concluding language of the majority opinion of the Court below:

> "The elaborate and carefully considered opinion of the court below in the instant case discloses that its dismissal of the writs of error was not done 'arbitrarily.'
>
> "Applying the teaching of the Supreme Court of the United States in the Waialua Co. case, supra, we find that the decision of the Territorial court is 'in conformity with the Constitution and the applicable statutes of the United States,' is not 'manifestly' erroneous in its 'statement or application of governing principles,' and should 'be accepted as stating the law of the Territory.'
>
> "Therefore, there being no 'clear departure from ordinary legal principles,' we are of the opinion that, even if we were to feel that greater leniency might have been extended to the appellant herein, 'the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.' Waialua Co. v. Christian, supra." (R. 335.)

Before concluding it might here be added that it is difficult to see how any appellate court can determine whether or not there has been a denial of due process of law, when the heart of the record in the trial court, the transcript of the testimony and the exhibits, is lacking.

CONCLUSION.

The decision of the Circuit Court of Appeals is correct, and in view of the fact that the interpretation and construction by a Court of its own rules has been consistently upheld unless manifestly and inescapably erroneous, it cannot be said that there was a "far departure from the accepted and usual course of judicial proceedings".

The decision of the Court below is not in conflict with decisions in this Court or other circuit courts of appeals, nor is it in conflict with applicable local decisions, nor does it present any substantial constitutional question, which has not been, but should be settled by this Court.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
March 5, 1948.

A. J. ZIRPOLI,
Attorney for Respondent.

TOM OKINO,
County Attorney, County of Hawaii,
Deputy Attorney General, Territory of Hawaii,
HENRY W. ROBINSON,
Of Counsel.

(Appendix Follows.)

Appendix

STATUTES INVOLVED.

Section 128 of the Judicial Code, as amended (28 U.S.C.A. Sec. 225) provides in part:

> "(a) Review of final decisions. The circuit courts of appeals shall have appellate jurisdiction to review by appeal final decisions—
>
> * * * *
>
> "Fourth. In the Supreme Courts of the Territory of Hawaii and of Puerto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; * * *."

Section 9555 of the Revised Laws of Hawaii 1945, provides:

> "A writ of error may be had as of right in term time or in vacation upon the application of a defendant in a criminal case or of any party in a civil case, or of any legal or personal representative of a deceased party in a civil case."

Section 9613 of the Revised Laws of Hawaii 1945, provides:

> "Rules. The supreme court may, from time to time, make rules consistent with existing laws for regulating the practice and conducting the business of the court, and thereafter revise such rules at its discretion; but in no case shall have power to impose costs not expressly authorized by law. * * *"

The Rules of the Supreme Court of the Territory of Hawaii. Rule 3, paragraph 1 (d) (Rules of the

Supreme Court of the Territory of Hawaii, 36 Haw. 753) provides *inter alia* that an appellant's brief

> "shall contain . . . a specification of the errors which are relied upon".

Rule 3, paragraph 1 (e) provides *inter alia* that an appellant's brief

> "shall contain . . . a brief of the argument exhibiting a clear statement of the points of law or fact to be discussed and the authorities relied upon in support of each point".